IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR
Civ. No. B 038975
(Super. Ct. No. C420153)

CHURCH OF SCIENTOLOGY OF CALIFORNIA and MARY SUE HUBBARD,

Appellants,

-against-

GERALD ARMSTRONG,

Defendant.

BENT CORYDON,

Appellee.

**Appeal from Superior Court of California
County of Los Angeles
Judge Bruce R. Geernaert**

REPLY BRIEF OF APPELLANTS AND RESPONSE TO CROSS APPEAL

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ARGUMENT

SUMMARY OF ARGUMENT

The appellants' interests in the continued sealing of the court file in this unique case are strong indeed. The appellants have strong confidentiality and privacy interests which permeate the entire case, which are protected by the seal on the court file. Appellants also relied upon the sealing in settling the underlying litigation with Armstrong. The lower court erroneously failed to give any weight to these interests of appellants. (Point I.) Appellee asserted purely private interests and has obtained all the relief he requested. There is no countervailing interest asserted here which outweighs the appellants' strong interests. (Point II.) The stipulation and order sealing the court file should have been upheld, and the lower court's order unsealing the court file should be reversed.

The cross appeal should be denied, because cross appellant has no right of access to private documents which have never been made a part of a public file in order to determine whether something in them might be relevant to litigation in which he is engaged. The lower court's order denying him access without prejudice to his legitimate discovery efforts should be affirmed.

POINT I

THE APPELLANTS' INTERESTS IN CONTINUED SEALING OF THE COURT FILE IN THIS CASE ARE STRONG

The underlying lawsuit between the Church and Armstrong had its genesis in Armstrong's theft of documents containing personal and confidential information. The whole purpose of the lawsuit was to recoup and maintain the confidentiality of the stolen materials. Unlike other cases where issues of confidentiality and privacy arose collaterally as to particular items of evidence or documents turned over in discovery -- see, e.g., Champion v. Superior Court, 201 Cal. App. 3d 777, 247 Cal. Rptr. 624 (1988); Coalition Against Police Abuse v. Superior Court, 170 Cal. App. 3d 888, 216 Cal. Rptr. 614 (1985) -- in this case the issue of confidentiality and privacy was the very subject matter of the underlying litigation.[1/] Thus everything that happened at the trial directly or indirectly concerned the issues of confidentiality and privacy, and Armstrong's knowledge of and access to confidential material permeated the trial.[2/]

[1/] Indeed, the trial court found that the Church had made out a prima facie case of conversion against Armstrong as bailee for the Church, breach of fiduciary duty and breach of confidence, and that Mary Sue Hubbard had made out a prima facie case of conversion and invasion of privacy. Brief of Appellants at 3; Memorandum of Intended Decision, Ex. C at. pp. 4-5.

[2/] Although it is true that only a small portion of the stolen documents were actually admitted into evidence, this is thus not the appropriate measure of the confidences breached at trial, where the stolen documents were the very subject of the trial.

Appellee's claim that there is no valid confidentiality or privacy issue at stake here, Brief of Appellee at 11-12, is clearly incorrect. Appellants do not rely upon a purely derivative right of privacy arising from L. Ron Hubbard, as appellee asserts.[3/] Rather, the appellant Church acted to vindicate its own and its members' claims of breach of confidence and theft of "personal" and "confidential" materials, and independent privacy claims of Mary Sue Hubbard were asserted as well.[4/]

The Church has a right to assert the right of privacy in its organization's documents. An organization, and particularly a religious organization, may assert First Amendment associational rights on behalf of its members, including the "[i]nviolability of privacy in group association." NAACP v. Alabama, 357 U.S. 449, 462 (1958). See United States v. Hubbard, 650 F.2d 293, 305-07 (D.C.Cir. 1970), discussed further in Brief of Appellants at 14; see also, Socialist Workers Party v. Attorney General, 463 F. Supp. 515, 524 (S.D.N.Y. 1978); 642 F. Supp. 1357, 1421 (S.D.N.Y. 1986).

[3/] Appellee Corydon's reliance upon Flynn v. Higham, which merely asserts the well-established rule that surviving kin cannot assert a right of privacy that was personal to their deceased relative, is thus entirely inapposite. This is not the basis of plaintiffs' privacy and confidentiality claims. The Flynn case, miscited in appellee's brief, can be found at 149 Cal. App. 3d 677, 197 Cal. Rptr. 145 (1983).

[4/] Nor is plaintiff correct in characterizing Mary Sue Hubbard's claims as de minimus. Brief of Appellee at 11. She had a substantial enough interest to be allowed to intervene in the action after it was initiated by the Church.

Indeed, the California cases have held that the Church, as custodian of the documents, had a duty to assert the right of privacy of the Hubbards and of Church members generally. In Craig v. Municipal Court, 100 Cal. App. 3d 69, 77, 161 Cal. Rptr. 19, 23 (1979), the court ruled that the California constitutional provision for privacy was self-executing in creating an enforceable right, and that a state agency which was the custodian of private information "has the right, in fact the duty, to resist attempts at unauthorized disclosure and the person who is the subject of the record is entitled to expect that his right will be thus asserted." In Board of Trustees v. Superior Court, 119 Cal. App. 3d 516, 525-26, 174 Cal. Rptr. 160, 164 (1981), this ruling was expanded to purely private litigation.[5/]

Although the Court of Appeal, Second District, has apparently never been presented with the question of whether an association or corporation -- as opposed to an individual -- has a personal right of privacy, two other Courts of Appeal have held that it does in situations such as that presented by this case.

[5/] Board of Trustees v. Superior Court contains a detailed discussion of the special protection which the rights of privacy and from disclosure of confidential information have been given under California law. 119 Cal. App. 3d at 524-26, 174 Cal. Rptr. at 164-65. In that case, the court noted that a third party's privacy rights cannot be compromised even if the party asserting the right -- i.e. the custodian of the information -- has unclean hands. 119 Cal. App. 3d at 533, 174 Cal. Rptr. at 169. This underscores the depth of the protection California courts give to privacy interests.

In H & M Associates v. City of El Centro, 109 Cal. App. 3d 399, 167 Cal. Rptr. 392 (1980), the Fourth District Court of Appeal faced the question squarely. In that case, the plaintiff was a limited partnership which owned and operated an apartment complex in El Centro, California. The City terminated water service to the apartment complex without notice, a hearing, or an opportunity to pay its delinquent accounts, and then notified the partnership's mortgagees, the local newspaper, and several other government agencies that the water service had been terminated and would not be reinstated. As a result of these actions, the plaintiff ultimately lost the property.

The plaintiff partnership sued the City for, inter alia, invasion of privacy. The lower court sustained a demurrer without leave to amend. In reversing that decision, the Fourth District Court of Appeal gave a thorough and thoughtful analysis of the question whether a partnership has a right of privacy, and concluded that it did. Its reasoning does not apply solely to partnerships, but, rather, applies to corporations and other associations as well. Indeed, the court relied squarely on the decision of the California Supreme Court in Vegod Corp. v. American Broadcasting Companies, Inc., 25 Cal. 3d 763, 160 Cal. Rptr. 97, 603 P.2d 14 (1979) (en banc), which held with reference to a corporation's right to sue for defamation:

> . . . there is no distinction between the protectible interest in reputation of corporations and individuals . . .. [¶] . . . the line between . . . natural persons and corporations is frequently fuzzy and ill-defined. Various legal considerations have long led to the incorporation of businesses

> that are in economic reality but individual proprietorships or partnerships. On the other hand, very large business enterprises may be conducted as individual proprietorships or partnerships. For that additional reason, it seems that for purposes of applying the First Amendment to defamation claims, the distinction between corporations and individuals is one without a difference.

25 Cal. 3d at 770-71, 160 Cal. Rptr. at 101-02, 603 P.2d at 18.

The court in H & M Associates noted that business entities such as partnerships or corporations acquire personalities and reputations distinct from the individuals who create them. It noted that the plaintiff was not suing for "hurt feelings" because a partnership, as distinct from its members, could not suffer humiliation or embarrassment. But it found that "businesses, regardless of their legal form, have zones of privacy which may not be legitimately invaded," and that such invasion can cause reputational and economic loss. 109 Cal. App. 3d at 410, 167 Cal. Rptr. at 399-400. Thus, the court upheld the plaintiff's right to sue for invasion of privacy under the California Constitution, and found that it had stated a cause of action for privacy invasion by the improper use of information obtained for a specific purpose.[6/]

[6/] Around the time that H & M Associates was decided, the First District Court of Appeal, in Ion Equipment Corp. v. Nelson, 110 Cal. App. 3d 868, 168 Cal. Rptr. 361 (1980) took the opposite view, rejecting a corporation's claim for invasion of privacy because corporations have no "feelings". The Ion Equipment Corp. court asserted that there was no California case law indicating that a corporate right of privacy exists, 110 Cal. App. 3d at 878-79, 168 Cal. Rptr. at 366, which reveals that the court did not have the benefit of the Fourth District's thoughtful and carefully reasoned opinion in H & M Associates when it made its decision.

In Roberts v. Gulf Oil Corp., 147 Cal. App. 3d 770, 195 Cal. Rptr. 393 (1983) the Fifth District Court of Appeal also upheld a right of privacy for corporations in situations such as that presented by this case, although with somewhat different reasoning than that of the Fourth District in H & M Associates. In Roberts, where the corporate defendant asserted a right of privacy against a county tax assessor's subpoena of documents, the Court rejected the notion that a corporation has a "fundamental" right of privacy available for such defensive use against government requests. However, the Roberts court held that corporations do have a "general" right of privacy, which depends upon the circumstances of the case. While the Roberts Court rejected a corporation's defensive use of the privacy right against a government subpoena, it noted that a different result may be reached in cases where a corporation asserts a tort cause of action for damages for privacy invasion. 147 Cal. App. 3d at 794 n. 16, 195 Cal. Rptr. at 409 n. 16. The court emphasized the importance of evaluating the specific case, including "the strength of the nexus between the artificial entity and human beings and the context in which the controversy arises." 147 Cal. App. 3d at 797, 195 Cal. Rptr. at 411. In this regard, the Court cited approvingly to H & M Associates, and quoted extensively from United States v. Hubbard, 650 F.2d 293 (D.C. Cir. 1980) (discussed further in Brief of Appellants at 14-15), emphasizing Hubbard's

reasoning that churches, even more than other corporations or organizations, have an enforceable privacy right. The Roberts court said:

> Although corporations have a lesser right to privacy than human beings and are not entitled to claim a right to privacy in terms of a fundamental right, some right to privacy exists. Privacy rights accorded artificial entities are not stagnant, but depend on the circumstances. United States v. Hubbard, supra, 650 F.2d 293 speaks to this point:
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> > "However, we think one cannot draw a bright line at the corporate structure. The public attributes of corporations may indeed reduce pro tanto the reasonability of their expectation of privacy, but the nature and purposes of the corporate entity and the nature of the interest sought to be protected will determine the question whether under given facts the corporation per se has a protectible privacy interest. Moreover at least certain types of organizations -- corporate or non-corporate -- should be able to assert in good faith the privacy interests of their members. Finally, whether acting for itself or on behalf of its members, surely the privacy interests of a 'church' [which was at issue in Hubbard] must be assessed somewhat differently from the privacy interests of other sorts of 'corporations.'"
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> (At pp. 306-307, fns. omitted; see also H & M Associates v. City of El Centro, supra, 109 Cal. App. 3d 409-412, 167 Cal. Rptr. 392.) 147 Cal. App. 3d at 796, 195 Cal. Rptr. at 411.

Thus, the two California Courts of Appeal which have had occasion to consider the issue thoughtfully have both upheld a corporate right of privacy such as that presented by the underlying litigation here.

Of course, this court need not rule on the adequacy or the merits of the confidentiality and privacy issues presented in the underlying litigation.[7] Rather, the issue before this court is simply whether there were privacy and confidentiality interests raised by plaintiffs in the case below which were deserving of the protection given by the trial court in sealing the record, and the degree of protection due those and other interests of plaintiffs when balanced against the necessity for disclosure asserted in this case. As demonstrated here, the privacy and confidentiality concerns were substantial indeed.

Nor was privacy the only substantial interest weighing in on appellants' side of the balance. There was also a substantial interest in the facilitation of settlements, as set out in Brief of Appellants at 16-19. That interest grew stronger as time passed, the settlement terms were executed and appellants

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[7] Although in the complaint invasion of privacy was specifically pleaded only for Mary Sue Hubbard, the Church pleaded conversion and misuse of confidential and personal materials, and breach of confidence. California has rejected the "theory of the pleadings" and allows recovery under any theory which fits the facts pleaded. "If facts pleaded will support a proper theory, it is immaterial that the plaintiff may have misconceived the theory of his suit, or pleaded an erroneous theory." Cal. Jur. 3d, Pleading § 78. See also, e.g., Porten v. University of San Francisco, 64 Cal. App. 3d 825, 833, 134 Cal. Rptr. 839, 844 (1976) (case pleaded as breach of confidential relationship is actionable as invasion of privacy). Further, the proof at trial established invasions of the privacy of the Church and its members, and the absence of an objection to the variance between pleadings and proof at trial constituted a waiver. See, Colbert v. Colbert, 28 Cal. 2d 276, 169 P.2d 633 (1946).

relied upon the privacy and confidentiality for which they had sued in the first instance and which they obtained through the settlement.

Appellee Corydon asserts that the California courts have rejected the notion that their interest in facilitating and enforcing settlements merits protection. Brief of Appellee at 13 et seq. This is not the case. In this litigious era of overcrowded dockets and understaffed courts, every court has a strong interest in facilitating settlements and being able to enforce them. The acceptance of sealed records in appropriate cases is one time-honored method used by the trial courts to carry out this laudable purpose. See, e.g., In re Franklin National Bank Securities Litigation, 92 F.R.D. 468 (E.D.N.Y. 1981), aff'd sub nom. FDIC v. Ernst & Ernst, 677 F.2d 230 (2d Cir. 1982), discussed in Brief of Appellants at 17-18.

The cases cited by appellee Corydon do not invalidate this valuable tool. In Mary R. v. B & R Corp., 149 Cal. App. 3d 308, 196 Cal. Rptr. 871 (1983), the appellate court remanded an order refusing to unseal a record containing evidence of sexual molestation by a physician of a fourteen year old patient when the sealed information was sought by the State's Division of Medical Quality which was carrying out its statutory obligation to discipline misconduct of physicians. 149 Cal. App. 3d at 318, 196 Cal. Rptr. at 877. The court did not rule that the sealing was improper, but, rather, rejected the notion that the Division's three-month delay in moving for access to the records, a delay

which did not cause any change of circumstances for any of the parties, was not in itself sufficient reason to deny the motion for unsealing. Rather, the court ruled, a balancing test of competing interests should be performed. 149 Cal. App. 3d at 317-18, 196 Cal. Rptr. at 877. Contrary to the implication in Brief of Appellee at 16-17, the court did not rule that the sealing of the court file offended public policy; that ruling was confined to a gag order which prohibited the victim from talking to the Division of Medical Quality about the doctor's acts. Id. at 315-17, 875-76.[8/]

None of the other cases cited by appellee Corydon even concern a settlement situation, let alone one that has been relied upon for several years. In Pantos v. City and County of San Francisco, 151 Cal. App. 3d 258, 198 Cal. Rptr. 489 (1984), a commercial jury investigation service operator sought to have information from the Jury Commissioner's files designated as "public records" under the Public Records Act (Gov. Code, § 6250 et seq.). In Estate of Hearst, 67 Cal. App. 3d 777, 136 Cal. Rptr. 821 (1977), the trustees of an estate sought to seal records from the purview of newsmen who wished to report on the court proceedings which were occurring contemporaneously. And in Champion v. Superior Court, 201 Cal. App. 3d 777, 247 Cal.

[8/] The Mary R case is discussed and distinguished from the instant case in Brief of Appellants at pp. 23-24.

Rptr. 624 (1988), there was no settlement and there was confusion among the parties as to whether portions of the file should or should not be sealed.

Champion is noteworthy for the care which the court took not to deprive trial courts of the discretion to use sealing where appropriate in their handling of cases before them. Rather than eliminating that option, the court merely set out a procedure for reviewing sealing decisions for cases at the appellate level, a status rarely reached in settled cases. The procedure the court established recognized and attempted to assuage the dilemma of a party who relies on a sealing order, if that order is later lifted. The court required that all confidential or arguably confidential materials be segregated and that arguments for and against sealing or continued sealing be made without disclosing the contents of the material. 201 Cal. App. 3d at 788-89, 247 Cal. Rptr. at 630-31. This was done precisely so that if the court decides to decline to seal documents, it may "permit[ ] the proffering party to withdraw them," 201 Cal. App. 3d at 789, 247 Cal. Rptr. at 631, thus avoiding the problem of detrimental reliance which appellants here would find themselves in if the sealing order which was an integral part of their settlement was withdrawn on the basis of procedural rules established several years after the settlement was entered.

Indeed, the Champion Court did not impose that harsh result on the litigants before it. Although that case established that litigants seeking to have the appellate court seal any

portion of a record must affirmatively assert the basis for the sealing, it did not impose that burden retroactively on the litigants in that case. Rather, to avoid unfairness and confusion, the court directed the clerk to seal the entire file in the case. 201 Cal. App. 3d at 790, 247 Cal. Rptr. at 631. This is, of course, precisely what Judge Breckenridge did below.

Thus the interests favoring the sealing of the court file -- maintenance of the privacy of appellants' confidential documents, and facilitation of settlements -- are both valid interests recognized by the courts of California. Appellee suggests that Judge Breckenridge was unaware of these interests when he ruled on the stipulation of settlement in the case and sealed the court file.[9/] Brief of Appellee at 5-10. This could not be further from the truth. The Judge had been assigned to the case for a long time, had been aware of the pretrial proceedings and had ruled on substantive pretrial motions, and had conducted a trial on the issues, in which he had found that plaintiffs (now appellants) had established a prima facie case on their conversion, breach of confidence and invasion of privacy claims. Ex. C at pp. 4-5. The trial court was fully aware of the confidential information that the case had been brought to protect, and of the significance of a settlement.

[9/] Appellee also asserts that the trial judge was "incredulous." Brief of Appellant at 6. The transcript in no way reflects this, and indeed shows the opposite. It is clear from the transcript that, as Judge Breckenridge himself explained, his initial question was merely seeking clarification of the scope of the stipulation regarding sealing in order to correctly apprise the clerk. Ex. J, at Ex. A appended thereto at pp. 6-7.

Appellee is correct in his observation that those facts were not presented on the record at the court appearance held on December 11, 1986, when Judge Breckenridge approved the settlement between the parties and entered his sealing order. But at that time, two years before the Champion decision, neither the court nor the parties were on notice that such a procedure might be desirable.[10/] The Champion court itself limited its ruling to prospective application only, sealing the entire file in that case although no justifications for sealing had been presented to the court. What was appropriate for the Champion litigants was clearly just as appropriate for the parties in this case several years earlier.

Contrary to appellee's assertions, the parties and the court's interests in sealing the file in this case were strong. Nor was there any impropriety in the procedure by which the file was sealed.[11/] As will be shown in Point II, the appellee Corydon

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[10/] As discussed above, even the Champion court confined the procedure it established to the appellate process, leaving the lower courts free to deal with sealing matters as they wished.

[11/] Appellee argues that Coalition Against Police Abuse v. Superior Court, 170 Cal. App. 3d 888, 216 Cal. Rptr. 614 (1985) prohibits the sealing which occurred in this case because the file had previously been open. Brief of Appellee 22-23. Appellee misunderstands the import of that case and the case it relies upon, Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977). They stand for the proposition that persons who have legally obtained unfettered access to information cannot be restrained from publishing it. But it does not mandate, as appellant would have it, the continued accessibility of material merely because it was once available.

has presented no countervailing interest to justifying unsealing the file, and Judge Geernaert erred in opening it to the public in this case.

POINT II

CORYDON HAS PRESENTED NO COUNTERVAILING INTERESTS TO JUSTIFY UNSEALING THE COURT FILE; ON THIS RECORD, JUDGE GEERNAERT ERRED IN ORDERING THAT THE FILE BE OPENED TO THE PUBLIC

As shown in Point I, appellants had substantial interests favoring sealing of the court file. Appellee Corydon presented no countervailing interests to justify unsealing of the file. Corydon asserted no public interest in the court file. Indeed, his motion specified that he sought access only to specific documents, not to the whole file, and that he sought it "only for private disclosure," i.e. for use in his pending litigation with the Church. Brief of Appellants at 5-6, Exh. H at 5, 7.

The specific documents sought by Corydon were no longer in the court file, having been released to the Church upon settlement of the case. However, Corydon and his attorneys did gain access to the entire court file when this Court, by its orders of December 22 and December 29, 1988, allowed Corydon and his counsel such access and permitted them to use it in pending

litigation with the Church, as long as they make a good faith request to the relevant court that the material be placed under seal. Exs. B, T.[12/]

Judge Geernaert's decision to open the court file to the public was thus made without a request for such public access and without any claim of public interest asserted. At most, it was based on a general public interest in access to court files in general, not articulated or advocated by anyone with respect to this particular file. It is obvious from the colloquy with Judge Geernaert at the brief hearing held on this matter that he was under a misapprehension of the law, believing that unsealing was "automatic[ ]" Tr. at 9. He therefore believed that no balancing of interests was necessary and that he was required to unseal the file in its entirety and to the public, upon any request for access, no matter how limited, even if it was "attenuated and perfunctory." Tr. at 15.

Because no public interest in the files was asserted in this case, there was nothing for Judge Geernaert to balance against the appellant Church's interests -- and thus no basis for him to disturb the sealing order instituted by Judge Breckenridge. But even if he believed that a public interest had been asserted, he would have had to balance that interest against the interests of plaintiffs. See, e.g., Mary R. v. B & R Corp., 149 Cal.

[12/] Corydon makes a pretense of complaint about the access thus obtained. Brief of Appellee at 4-5. However, it is hard to see what he has to complain about, since he has obtained more than the full relief he sought.

App. 3d 308, 196 Cal. Rptr. 871 (1983). Judge Geernaert failed to undertake the necessary balancing, holding, instead, that the unsealing was "automatic[ ]." This gratuitous interference with the settlement of a case raising sensitive confidentiality and privacy concerns was unjustified and wrong as a matter of law, and should be reversed.

RESPONSE TO CROSS-APPEAL

CROSS APPELLANT IS NOT ENTITLED TO ACCESS TO SEALED MATERIALS WHICH HAVE NEVER BEEN PART OF A PUBLIC RECORD

In his cross appeal, Corydon seeks access to six items -- five documents and a set of two audio tapes -- which are under seal and have never been made part of the record in the underlying litigation. Corydon incorrectly refers to these items as "pieces of evidence within the court files." Brief of Appellee at 27. These items were never admitted into evidence. They were among the documents stolen by Armstrong from the Church archives. At the outset of this litigation, the trial court enjoined Armstrong from copying or disseminating this material, and required him to surrender the documents with the clerk of the court to be placed under seal. This was done, and the items remained in a status akin to bailment throughout the subsequent litigation. They remain in the court file now solely because there remains some possibility that the Internal Revenue Service may be entitled to look at some of them at the conclusion of the litigation in United States v. Zolin. See infra, at 20-21.

During the trial, Armstrong attempted to introduce the tape recordings, which were marked as Ex. 500-CCCCC for identification only, into evidence.[13/] Plaintiffs objected on

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[13/] The facts presented in this and the following two paragraphs are found in Plaintiff/Intervenor's and Cross-Defendant's Motion For Clarification And/Or Reconsideration To Preserve Seal On One Document Previously Held Excluded From Evidence And Held To Be

(footnote continued)

grounds of attorney-client privilege, and showed that the tapes were recordings of two attorney-client conferences. The trial court refused to enter the tapes into evidence, ruling that they were presumptively covered by the attorney-client privilege. The trial court maintained the seal on the exhibit at the conclusion of the trial. The five documents sought by Corydon on his cross appeal also were never introduced into evidence or into the public file in this case, and have remained sealed since they were first deposited into court. Corydon's characterization of these documents and tapes as public documents in a public file, Brief of Appellee at 29, 30, is inaccurate and misleading.

While this case was still pending before the trial court, the United States Department of Justice sought access to various documents in this case, including Exhibit 500-CCCCC (the tapes). On February 11, 1985, Judge Breckenridge denied the government's motion. He ruled that the tapes were protected by the attorney-client privilege, that the Church had not waived the privilege, and that the so-called "crime-fraud" exception to the privilege was not applicable. On March 4, 1988, the government's appeal from Judge Breckenridge's ruling was dismissed.

Subsequent to Judge Breckenridge's order of February 11, 1985, the Internal Revenue Service issued an administrative summons to the clerk of the Superior Court demanding that the clerk turn over various documents in this case, including exhibit

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(footnote continued from previous page)
Protected By Attorney-Client Privilege, And Five Additional Documents Previously Excluded From Evidence And Maintained Under Seal, and the documents attached thereto, Ex. L.

500-CCCCC, for use in an ongoing IRS investigation. The plaintiff herein intervened in the proceeding and opposed production of the tapes on grounds of attorney-client privilege. The United States District Court for the Central District of Los Angeles (Harry Hupp, J.) held that the tapes were privileged, and denied enforcement of the summons with respect to the tapes. Judge Hupp ordered limited enforcement of the summons with respect to the five other documents which remain under seal in this court's file,[14/] prohibiting the IRS from disseminating or disclosing the contents of those documents to any other federal agency. Judge Hupp's decision was affirmed by a panel of the Ninth Circuit Court of Appeals, United States v. Zolin, 809 F.2d 1411 (9th Cir. 1987), and by the Ninth Circuit, sitting en banc, United States v. Zolin, 842 F.2d 1135 (1988). (The Ninth Circuit panel and the en banc court precluded counsel from referring to the contents of the tapes at oral argument, because of the public nature of the hearings.)

The Supreme Court granted certiorari on the question of whether the Ninth Circuit and the District Court followed the correct federal court procedure in determining that the privileged tapes were not subject to the "crime-fraud" exception to the attorney-client privilege. The Supreme Court decided the case on June 20, 1989, affirming the conditional enforcement order with

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[14/] It is noteworthy that the burden was on the government in the first instance to establish the relevance of the documents to its inquiry before any release of documents was made. The government met its burden as to the five documents, but failed to meet it as to eight others, which were ultimately returned to the Church.

respect to the five documents, and remanding for a further determination as to whether the government properly preserved a request for in camera review of the audio tapes, and if so, whether in camera review is justified. United States v. Zolin, ___ U.S. ___, 109 S.Ct. 2619 (1989). The case is currently on remand before the Ninth Circuit Court of Appeals.

With respect to the latter question, the Supreme Court prohibited "groundless fishing expeditions," 109 S.Ct. at 2630, and ruled that in camera review is only appropriate upon "'a showing of a factual basis adequate to support a good faith belief . . .' that in camera review may reveal evidence to establish that the crime-fraud exception applies." 109 S.Ct. at 2631, quoting Caldwell v. District Court, 644 P.2d 26, 33 (Colo. 1982).

Meanwhile, while the collateral litigation with the federal agencies was proceeding in the state and federal courts, the parties in this case reached a settlement of the Church's underlying claim for return of the documents, and of Armstrong's counterclaims. Pursuant to that settlement, all documents in the court file were to be returned to the Church, and the file was to be sealed. This reflected the fact that the underlying purpose of the litigation was to protect the privileged and private documents which Armstrong had taken. The tapes, and the five additional previously sealed documents, however, were not returned because of the ongoing litigation in the federal courts in the Zolin case. They remained under seal by order of the Court, Ex. C at. 2 n. 1, and have remained sealed until this day.

Corydon moved before Judge Geernaert for access to the six sealed items which are the subject of the Zolin litigation. Judge Geernaert observed that the material could be sought through the ordinary processes of discovery, and denied Corydon's motion without prejudice to such discovery requests. He required the Church to indicate in response to proper discovery requests whether any of the six items would be responsive to the request, so that Corydon could then move to unseal it. Ex. Y at 9; Ex. Q.

Corydon has never sought the material through legitimate discovery methods, as he was permitted under Judge Geernaert's order. Rather, as he confesses in his brief on cross appeal, he continues to seek to rummage through these documents and tapes to determine whether he can find anything of possible relevance to his ongoing litigation, Brief of Appellee at 29. In effect, he seeks to undertake the very "groundless fishing expedition" that the Supreme Court has ruled that even the United States Government is not entitled to. Zolin, supra, 109 S.Ct. at 2630.

Cross appellant is not entitled to access to these private documents and tapes which have never been publicly disclosed, and his cross appeal should be denied.

CONCLUSION

For the reasons stated here, the order of the Court below dated November 9, 1988, unsealing the court file to the public, should be reversed; the order of the court below dated November 30, 1988, maintaining the seal on the documents and the audio tapes which are the subject of the Zolin litigation, should be affirmed.

Dated: New York, New York
January 18, 1990

Respectfully submitted,

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